Petition

81-1557

No.

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ALEXANDER L. STEVAS,

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

BORG WARNER CORPORATION, *et al*,
Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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I.

QUESTIONS PRESENTED

1. Whether Section 8(a)(5) of the National Labor Relations Act requires an employer to bargain with a union about the effects of a decision which does not have a detrimental impact on the bargaining unit?

2. Whether a collective bargaining obligation existing at one corporate entity can be extended to a newly created corporate entity the creation of which did not have a detrimental impact on the pre-existing bargaining unit and was not the result of union animus or a desire to evade the bargaining obligation?

3. Whether a Finding by the National Labor Relations Board that two corporate entities are a single employer is alone sufficient to support extension of the collective bargaining obligation from one such corporate entity to the other in the absence of a finding that the two constitute an appropriate unit for bargaining?

4. Whether evidence of anti-union motivation has been removed as an element of proof from unfair labor practice proceedings?

TABLE OF PARTIES

Petitioners:

Borg Warner Corporation

Baker Industries, Inc.

Wells Fargo Armored Service Corporation

Pony Express Courier Corporation

Respondent

National Labor Relations Board

Charging Parties

International Union, United Plant Guard Workers of America, Local 102 and Local 106

Rule 28 Listing Of Corporate Affiliates To Wells Fargo Armored Service Corporation And Pony Express Courier Corporation

Pyro-Chem, Inc.

Baker Protective Services, Inc.

Consolidated Facility Services, Inc.

Pyro Tronics Canada, Ltd.

Wells Fargo Armcar, Inc.

The Amplitron Company

The Desert Patrol

Eagle Watch and Patrol Service, Inc.

Wells Fargo Alarm Service, Inc.

Wells Fargo Alarm Services of Canada, Ltd.

Wells Fargo Armored Service Corporation of D. C.

Wells Fargo Guard Service, Inc. of Florida

Transportes Blindados

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NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioners, Borg Warner Corporation, et al, prays that a Writ of Certiorari issue to review the Decision and Order of the United States Court of Appeals for the Sixth Circuit enforcing an order of the National Labor Relations Board.

OPINIONS BELOW

The opinion of the Court of Appeals (App A at p. 2)[1] is reported at 663 F.2d 666, with the Court's denial of Petitioner's Petition for Rehearing and Suggestions for Rehearing en banc (App A at p. 6) reported at ____ F.2d ____. The Findings of Fact, Conclusions of Law and Order of the National Labor Relations Board (App. A at p. 7) are reported at 245 NLRB No. 73 (1979).

JURISDICTION

The Order of the United States Court of Appeals for the Sixth Circuit enforcing the Board's Order was entered on October 28, 1981. The Order of the Court denying Petitioner's Petition for Rehearing and Suggestion for Rehearing en banc was entered on January 5, 1982. This petition was filed within ninety (90) days of that date. The jurisdiction of this Court is envoked under 28 USC Section 1254(1) and Section 10(f) of the National Labor Relations Act, as amended.

STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended, are Sections 8(a)(1), 8(a)(3), 8(a)(5) and 8(d). They are set forth in Appendix B.

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[1] "App A" and "App B" refer to appendices to this Petition for Certiorari. Appendix A contains the judgments and Opinions of the Court below, and the Decision and Orders of the National Labor Relations Board and the Administrative Law Judge. Appendix B contains the relevant provisions of the National Labor Relations Act.

STATEMENT OF THE CASE

Prior to 1975, Petitioner Wells Fargo operated on a virtually nationwide corporate basis as both an armored car service company and as a courier service company (A 208).[2] Essentially, armored car service business involves the utilization of armored trucks to transport coins, currency, bullion, negotiable securities and other commodities of high intrinsic value; whereas, courier service business involves the transportation of relatively small commodities which are not intrinsically valuable but which must be transported on a time critical basis (A 70-71).

Unlike its competitors, the Wells Fargo facilities in Nashville and Knoxville each provided both of these services within the same operational enterprise (A 208, 221, 262). In doing so, employees at both facilities were called upon to perform both armored and courier service functions (A 91, 111, 129, 146, 148, 156, 208). Indeed, not only did the employees in actuality perform dual functions, but the collective bargaining agreements between Local Unions 102 and 106 with Wells Fargo in Nashville and Knoxville, respectively provided for multi-function job classifications. Thus, these agreements provided exclusively for the job classifications of driver guards, messenger guards and guards (A 331, 349). Furthermore, the Board issued certifications for Local Union 102 at Knoxville and Local Union 106 at Nashville did not provide for a separate courier job classification (A 3). Thus, the employees at Nashville and Knoxville were, by way of their unions contractual agreements, as well as the Board issued certifications, classified and qualified to perform both armored and courier functions.

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[2] "A" refers to the Appendix to the Court of Appeals.

However, performing both armored and courier services within the same operational enterprise proved to be inefficient to Wells Fargo because of the basic operational differences in providing the two services (A 70-72, 208, 221, 261). The improvidence of performing both services within the same operational enterprise was reflected in the fact that Wells Fargo was the only company in the industry performing both courier and armored services (A 221, 262). Indeed, each of Wells Fargo's competitors had heretofore previously separated the two services into distinct operational enterprises (A 262, 221).

As a result of the foregoing, in 1975 Pony Express was incorporated for the express purpose of specializing in time critical delivery of non-negotiable items, i.e. courier services (A 206, 208). Thereafter, the first instance in a nationwide corporate plan of transferring this work to Pony Express occurred in Wells Fargo's Florida locations (A 208). Subsequent thereto, but prior to the transfer herein, Pony Express assumed the Wells Fargo courier functions in Alabama, Louisiana, Nebraska, Iowa, Colorado, Wyoming, New York and Utah (A 208).[3]

Consistent with the foregoing, the Vice President and General Manager of the Memphis Region of Wells Fargo made the decision, in January, 1978, to discontinue performance of the courier services at the two locations under his direction—Nashville and Knoxville (A 261-262, 264(L)-264(I)). This decision was to be effectuated regardless of whether or not the courier operation was assumed by another entity (A 261). However, consistent with the above referenced pre-existing nationwide plan, a decision subsequently was made to have Pony Express assume the courier functions effective April 1, 1978.

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[3] At the time of the transfer of the courier function from Wells Fargo in Omaha, Nebraska to Pony Express in Omaha, Nebraska the International Union involved herein represented the employees at Wells Fargo in Omaha, Nebraska.

Compounding the economic problem posed by attempting to perform both armored and courier services out of the same facilities, on February 1, 1978, Wells Fargo was advised that effective April 1, 1978, it would lose its contract in Nashville with the Federal Reserve Bank (A 209, 260-261). The loss of this contract amounted to a 25% loss of armored service work from the Nashville facility (A 231, 233). As a result of this decision, Wells Fargo determined that five employees would have to be laid off from Nashville and existing routes would have to be restructured (A 264(b)-(c), 247, 79-80). These changes were slated to go into effect April 1, 1978.

On March 20, 1978, representatives of Wells Fargo and the Union met in Detroit, Michigan (A 230). The Union was advised that as a result of the loss of the Federal Reserve contract there would be approximately five employees laid off, from Nashville (A 231). The Union was further advised of the Company's decision to discontinue its courier operation, and that Pony Express would thereafter assume that function (A 232). On May 9, 1978, representatives of Wells Fargo and the Union met again to discuss the effects of the decision to discontinue the courier function on the Wells Fargo employees (A 236-237, 239, 264(d)). At this meeting the Union was assured that the laid off employees would receive all accrued vacation and sick pay (A 242, 264(g)). Furthermore, the method of recall and part-time work for laid off employees was discussed.

Significant to the foregoing scenario, is the fact that no employees were laid off in Knoxville (A 247). Furthermore, all of the employees laid off in Nashville, as a result of the loss of the Federal Reserve contract, were laid off on the basis of seniority pursuant to the collective bargaining agreement (A 248, 334-337) and were subsequently recalled, or offered recall to their former positions (A 248).

Finally, the unrelated decision to transfer the courier operation to Pony Express in effect merely removed a single job func-

tion from what was in actuality, as well as contractually, a multi-function job classification. In essence, the number of employees was not reduced by this decision (as evidenced by the absence of layoffs from Knoxville); the bargaining units remained unchanged and the employees therein continued to perform armored car functions which they were contractually classified to perform.

The Board's Conclusions of Law And Order

The Board, adopting the conclusions of law of the Administrative Law Judge found that Petitioners had violated Section 8(a)(5) by refusing to bargain with the Union respecting the effects of Petitioner's decision to transfer its courier operations from Wells Fargo to Pony Express.[4] The Board further accepted the ALJ's finding that the Union was the majority representative for the purposes of collective bargaining with Petitioners in units stated to include both the Wells Fargo and Pony Express facilities; at the respective Nashville and Knoxville locations. The Board also adopted the finding of the ALJ that Petitioner's discriminated, in violation of Section 8(a)(3) and (1), in regard to hire and tenure of employment for certain specifically named individuals who were laid off from the Wells Fargo facility in Nashville (App A at pp. 30-32).[5] This later finding was based upon this Court's inherently distructive doctrine enunciated in *NLRB* v. *Great Dane Trailers,* 388 U.S. 26 (1968) (App A at p. 32).

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[4] The Board, adopting the conclusion of the ALJ, found that Petitioner was not obligated to bargain with the Union respecting the decision to transfer its courier operation from Wells Fargo to Pony Express. This portion of the decision was not contested by either party, and is of no concern here.

[5] One other individual was included in this portion of the Board's findings, who was found to have been constructively discharged (App A at p. 34).

The Board's Order directed Petitioners to bargain with the Union respecting the effects of the decision to transfer the courier operations from Wells Fargo to Pony Express. The Board's Order further directed Petitioners to recognize and bargain with the union as the exclusive representative for the employees in units defined to encompass the facilities of Wells Fargo and Pony Express in Nashville and Knoxville, respectively. The Board's Order also directed Petitioners to offer immediate and full reinstatement to certain specifically named individuals at either the Nashville or Knoxville facilities of Petitioners, and to make them whole for any loss of pay (App A at 10).

The Decision Of The Court Of Appeals

The Court of Appeals, acting upon the petition of the Board pursuant to Section 10(f) of the Act, granted enforcement of the Board's Order (App A at p. 1).

The Court concluded that substantial evidence supported the Board's findings that: (1) Petitioners Wells Fargo and Pony Express were a single employer, and that Pony Express was the alter ego of Wells Fargo; (2) Petitioners failed to bargain with the Union respecting the effects of the decision to transfer the courier operations from Wells Fargo to Pony Express; (3) Certain specifically named individuals were dismissed from employment in violation of Section 8(a)(3) and (1), despite the absence of proof of anti-union motivation, on the strength of this Court's decision in *NLRB* v. *Great Dane Trailers, Inc., supra;* and, that (4) Petitioners be required to bargain with the Union as the representative of Pony Express' employees in Nashville and Knoxville (App A at pp. 2-5).

In reaching this latter conclusion the Court relied on the decision of the Ninth Circuit in *NLRB* v. *Triumph Curing Center,* 571 F.2d 462 (CA 9, 1978); a case, unlike the case at bar, involving a "classic" run-a-way shop replete with union animus.

REASONS FOR GRANTING THE WRIT

I. The Writ Should Be Granted To End The Conflict Among Circuits And Clarify The Scope Of Managements Duty To Bargain Respecting The Effects Of Economically Motivated Decisions Which Do Not Have A Detrimental Impact On The Bargaining Unit.

The decision below conflicts with decisions in the Courts of Appeals for the First, Second, Third, Fourth and Tenth Circuits, as discussed below, pp. 9-10, *infra*. This conflict results, as we show preliminarily, from the court belows misapplication of this Court's decision in *First National Maintenance Corp.* v. *NLRB*, U.S. ____, 47 U.S.L.W. 4769 (1981). Review is required to resolve this conflict and to supply needed guidance on a recurrent question of importance to the economy and to the promotion of labor-management harmony.

A. First National Maintenance: Bargaining Whether It Respects Decisions Or Effects Thereof, Is Not An Absolute Obligation Without Reference To The Underlying Facts.

In this Court's recent decision in *First National Maintenance, supra,* Justice Blackmun, speaking for the Court, stated that:

> "...[I]n establishing what issues must be submitted to the process or bargaining, Congress had no expectation that the elected union representative would become an equal partner in the running of the business enterprise in which the union's members are employed. Despite the deliberate open endedness of the statutory language, there is an undeniable limit to the subjects about which bargaining must take place . . . At 69 L.Ed.2d 318, 329.

Justice Blackmun, relying upon the Congressional history of the Act, noted that the limits to the subjects about which bargaining must take place will "inevitably depend upon the traditions of an industry, the social and political climate at any

given time, the needs of employers and employees, and many related factors." At 69 L.Ed.2d p. 318, 328 fn. 14. One such factor, which Justice Blackmun implicitly recognized, is whether the managerial decision about which bargaining is sought has a direct impact on the employment relationship.

Application of a direct impact prerequisite for "effects" type bargaining is consistent with the teachings of *First National Maintenance, supra,* and, as shown below, the holdings of nearly half the circuits.

B. Conflicts Among The Circuits: Detrimental Impact, A Prerequisite To "Effects" Type Bargaining.

The decision below, by its silence, fails to recognize that management's duty to negotiate with the Union concerning the effects of an economic decision devolves upon it only when the implementation of the decision has a significant impact on employees within the bargaining unit. That such a showing is a necessary requisite is amply demonstrated by the holdings of the First, Second, Third, Fourth and Tenth Circuits. See: *NLRB* v. *King Radio Corp.*, 416 F.2d 569, 571 (CA 10, 1969); *District 50, United Mine Workers of America, Local 13942* v. *NLRB,* 358 F.2d 234, 237, 238 (CA 4, 1966); *Puerto Rico Telephone Co.* v. *NLRB,* 359 F.2d 983 (CA 1, 1966); *Japan Airlines Co., Ltd.* v. *International Association of Machinists and Aerospace Workers,* 538 F.2d 46 (CA 2, 1976); *Equitable Gas Co.* v. *NLRB,* 637 F.2d (CA 3, 1981). The facts in this case are undeniable that there was no detrimental impact on employees in the bargaining unit arising out of the decision to sever the courier services from armored services.

The record in this case shows that when the decision was carried out the employees performing courier services were assigned armored service work as guards, which they were classified under the express terms of the collective bargaining agreement to perform in the first instance (A 89), and to which function Wells Fargo had every right to assign them under the express

language of the contract (A 372). Their wages, hours and working conditions were not altered as a result of the decision (A 79-80). The bargaining unit remained intact and the union remained the bargaining representative in the unit for which it was certified.

Furthermore, no one lost their job as a result of the decision (A 79-80). The five employees laid off at Nashville were laid off as a result of the loss of the Federal Reserve contract (A 247). This is demonstrated by the fact that no employees were laid off at Knoxville where the loss of the Federal Reserve contract was not applicable (A 247). Finally, in this regard, the five employees laid off in Nashville as a result of the loss of the Federal Reserve Contract were laid off for only a short period of time and then recalled pursuant to their rights under the collective bargaining agreement.

We respectfully submit that the court below, contrary to the teachings of *First National Maintenance, supra, Fibreboard Paper Products* v. *NLRB,* 379 U.S. 203 (1964), and numerous decisions of circuit courts, inflexibly imposed the bargaining obligation without regard to the absence of any detrimental impact on the bargaining unit. Such a mechanistic approach to this obligation can have stulifying effects on an employer's freedom to manage its business.

II. The Writ Should Be Granted To Prevent Disruptions To Commerce And Denial Of Employee Rights Which May Result From Extension Of Bargaining Obligations From One Corporate Entity To A Newly Created Corporate Entity, The Creation Of Which Was Economically Motivated And Devoid Of Union Animus.

As the ALJ specifically stated "substantial evidence in the record shows that the decision (to create Pony Express) was made for economic reasons and not pursuant to anti-union motivation" (App A at p. 28). In spite of this finding, the ALJ

went on to find that Pony Express and Wells Fargo were a single employer and, therefore, the bargaining obligation existing at Wells Fargo was extended to Pony Express.

It is respectfully submitted, as shown below, that such a finding contravenes the holding of this Court in *South Prairie Construction Company* v. *Local 627 IOUE (Peter Kiewit),* 425 U.S. 800 (1976). Furthermore, such a finding can have stultifying effects on corporate expansions which are economically, rather than illegally, motivated.

A. The Decision Below Contravenes This Court's Decision In Peter Keiwit.

The Court below sustained findings by the Board that Wells Fargo and Pony Express were a "single employer" and/or "alter ego" and, therefore, that the bargaining obligation devolved upon Pony Express to recognize and bargain with the Union at the new enterprise. The result of the Court's holding in this regard is that upon a finding of "single employer" and/or "alter ego" status, such finding automatically carries with it the duty to recognize a union at the new location. The Court's holding in this regard is thus in express contradiction of the decision of the Supreme Court in *Peter Kiewit, supra,* and contravenes the great weight of judicial authority which has addressed the subject.

That a finding of "single employer" and/or "alter ego" status does not carry with it the bargaining obligation at the new location absent an independent finding that the new unit is appropriate for bargaining purposes was underlined by this Court's *Peter Kiewit, supra,* decision and also recently noted by the Ninth Circuit in *Big Bear Super Markets* v. *NLRB,* 640 F.2d 924, 931 (CA 9, 1980). Conspiciously absent from the case at bar is any factual predicate for such an independent finding by the Board. This Court's *Peter Kiewit, supra,* decision makes it clear that a determination that a union and a non-union employer constitute a single employer is not, in itself, sufficient

to bind the non-union employer to the terms of the union employer's contract. An additional *sine qua non* to a finding of single employer status prior to the Board's imposing a bargaining obligation upon a non-union employer is an independent finding that the new unit is appropriate for bargaining purposes. As there is no factual predicate for such a finding by the Board herein, the decision below is at irreconcilable odds with this Court's *Peter Kiewit, supra,* decision.

B. The Imposition Of The Bargaining Obligation Solely On The Basis Of A Finding Of Single Employer Status Is Contrary To Existing Precedent, Detrimental To Corporate Expansion, And Vitiates Employee Section 7 Rights.

A synthesis of all the judicial authority on the subject reveals that a finding of "single employer" and/or "alter ego" is a meaningless finding standing alone. The critical inquiry in any "single employer" case is "single employer" for what purpose? It is conceded that the Board may utilize the doctrine for purposes of (1) meeting jurisdictional standards, as in *Sakrete of Northern California, Inc.* v. *NLRB,* 332 F.2d 902 (CA 9, 1964); (2) for purposes of assessing liability for backpay, as in *Royal Typewriter Co.* v. *NLRB,* 533 F.2d 1030 (CA 8, 1976); (3) for purposes of determining whether picketing is primary or secondary in secondary boycott cases, as in *Newspaper Production Company* v. *NLRB,* 503 F.2d 821 (CA 5, 1974); or (4) for purposes of service of process, as in *Sturdivant Sheet Metal and Roofing* v. *NLRB,* 636 F.2d 271 (CA 10, 1980).

However, before the doctrine may be utilized to impose a bargaining obligation upon an employer whose transfer of operations is economically motivated, as here, there must be a showing of majority status at the new location, *NLRB* v. *Rapid Bindery,* 293 F.2d 170 (CA 2, 1961); *Cooper Thermometer Co.* v. *NLRB,* 376 F.2d 684 (CA 2, 1967); or an independent finding of accretion or a finding that the broader unit is appropriate, *South Prairie Construction Co.* v. *Local 627 IOUE (Peter*

Kiewit), 426 U.S. 800 (1976). There are no cases where the situation has been otherwise, except to remedy a "runaway shop" situation where an employer is motivated by reasons to flee the bargaining agent because of hostility to it, as in *NLRB* v. *Triumph Curing Center,* 571 F.2d 462 (CA 9, 1978). Each of these situations is totally absent herein. The reason for these imperatives is obvious and was discussed at length by Judge Friendly in *Cooper Thermometer, supra.* To otherwise impose a bargaining representative on employees in the new unit would violate the Section 7 rights of these employees and thrust union representation upon them against their will. See also: *Local 57, ILGWU* v. *NLRB,* 374 F.2d 295 (CA D.C. 1967).

In the circumstances present herein, an analysis of these factors, as applied to the instant case, supports the conclusion that the decision in issue is erroneous and is contrary to the teachings of this court and the majority of circuit courts interpreting this issue. Furthermore, the decision below may well hinder lawful corporate expansions, due to its unwarranted extension of bargaining obligations from one corporate entity to another, the creation of which is not the result of a desire to evade the bargaining obligation. As noted, *infra,* the Wells Fargo bargaining unit remained intact without detrimental impact resulting from the transfer of courier work to Pony Express. Thus, the union continues to represent that which they were certified to represent, i.e. the Wells Fargo bargaining units.

III. The Writ Should Be Granted In That The Decisions Below Are In Contradiction With This Court's Decision *In NLRB* v. *Great Dane Trailers,* 388 U.S. 26 (1978), And Has Thereby Eliminated Illegal Motivation As An Essential Element Of Proof Where There Have Been Express Findings Of Substantial And Legitimate Business Justification And An Express Finding Of No Union Animus.

In sustaining the Board's findings that the layoff of five employees at the Wells Fargo facility was discriminatory and

violative of Section 8(a)(3) and (1) of the Act, the Court below adopted the Board's rationale that refusing to transfer Wells Fargo[6] courier employees to Pony Express was conduct "inherently destructive of employee rights" as contemplated by this Court's decision in *Great Dane*. We respectfully submit, there is no way, under the facts of this case that the "inherently destructive" doctrine can be applicable. On the contrary, enforcement of the Board's Order in this regard contravenes *Great Dane* and the decisions of a majority of the circuits which have interpreted the doctrine.

In the immediate case, the Administrative Law Judge expressly found that the layoff in question at the Nashville facility was (1) economically motivated, and (2) absent of any anti-union motivation (A. 13-14). The Administrative Law Judge, nevertheless, found that the layoff was violative of Section 8(a)(3) by the gratuitous application of this Court's "inherently destructive" doctrine. A synthesis of all the cases interpreting the application of *Great Dane*, however, leads to the inescapable conclusion that by the ALJ's finding of no union animus *and* the concomitant finding of proper motivation, he has necessarily rendered *Great Dane* inapposite.

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[6] The gratuitous suggestion by the Board that the Wells Fargo employees possessed a right to transfer to the Pony Express facility, laid bare, is nothing short of a bald faced proposition that an employee has a property right to transfer to a new operation of the same employer. But see, *Ford Motor Co.* v. *Huffman*, 345 U.S. 330 (1953). However, in this regard the Sixth Circuit has held that rights to transfer to a new location, even as to the same employer, is wholly a creation of the collective bargaining agreement and does not exist apart from that agreement. *Charlean* v. *Norge Division, Borg Warner Corp.*, 407 F.2d 1062 (CA 6, 1969); *Odie* v. *Ross Gear & Tool Co.*, 305 F.2d 143 (CA 6, 1969). In the immediate case, the collective bargaining agreement is unequivocable in that it expressly grants the company the right to assign employees to any job within their classification (A 372, 89). Wells Fargo, therefore, had every right to insist upon the retention of these five employees at armored service jobs and to refrain from any discussion regarding their transfer to Pony Express.

Since the *Great Dane* decision was handed down circuit courts have followed its guidelines scrupulously. Thus, they have found discrimination, absent proof of illegal motivation, *exclusively* in cases where the alleged discriminatees were distinguishable from other employees only by their concerted or union activities. Such cases have been confined to situations (1) where the conduct has had far-reaching effects on future bargaining, or (2) where the conduct complained of discriminates only upon the basis of participation in strike or concerted activity. See: *Intercollegiate Press* v. *NLRB*, 486 F.2d 837 (CA 8, 1973); *Portland Williamette Co.* v. *NLRB*, 534 F.2d 1331 (CA 9, 1976); *Indiana & Michigan Electric Co.* v. *NLRB*, 599 F.2d 227 (CA 7, 1979); *Borden, Inc.* v. *NLRB*, 595 F.2d 313 (CA 1, 1979); *Wilson Freight Co.* v. *NLRB*, 604 F.2d 712 (CA 1, 1979); *Texas Instruments, Inc.* v. *NLRB*, 599 F.2d 1067 (CA 1, 1979).

In short, while *Great Dane* allows a finding of discrimination absent a showing of anti-union motivation when there is *no proof* of economic justification, or when the employer's evidence of business justifiction is rejected, there are no cases where there has been a finding of discrimination in the absence of a showing of anti-union motivation *and* where there is an express finding of economic justification. The net result of the application of *Great Dane* by the Court below is to eliminate motivation altogether as an element of proof. The *Great Dane* doctrine does not remove the element of motivation; it simply excuses such a showing where there is an absence of proper motivation. By adoption of the Board's rationale herein, the Court below has contravened the language and decision of this Court's *Great Dane* doctrine and the great weight of a judicial authority by other circuits on the subject.

CONCLUSION

This petition for a Writ of Certiorari should be granted.

Respectfully submitted,

ELARBEE, CLARK & PAUL

By: Fred W. Elarbee

Fred W. Elarbee

Counsel for Petitioners

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ELARBEE, CLARK & PAUL

By: Robert L. Thompson

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Of Counsel

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404/659-6700

CERTIFICATE OF SERVICE

The undersigned hereby certifies that all parties required to be served with copies of Petitioners Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit have been so served, as set forth below, this 18 day of February, 1982, by depositing the same in the United States Mail, postage prepaid and addressed as follows:

Elliott Moore, Deputy Associate
General Counsel
National Labor Relations Board
1717 Pennsylvania Avenue, N. W.
Washington, D. C. 20570

Raymond A. Jacobson, Director
Region 26
National Labor Relations Board
P.O. Box 4085 Crosstown Station
Mid Memphis Tower - 8th Floor
Memphis, Tennessee 38104

Solicitor General of the United
States Department of Justice
Washington, D.C. 20530

International Union, United Plant
Guard Workers of America
2142 First National Bank Building
Detroit, Michigan 48226

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ELARBEE, CLARK & PAUL
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Appendix

APPENDIX A

No. 80-1046

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

National Labor Relations Board,
Petitioner,

v.

Borg Warner Corporation; Baker Industries, Inc.; Wells Fargo Armored Service Corporation; Pony Express Courier Corporation,
Respondents.

JUDGMENT

Filed Oct. 2, 1981

Before: KEITH and MARTIN, Circuit Judges; and DUNCAN, District Judge.

On application to enforce an order of the National Labor Relations Board.

This cause came on to be heard on the record of proceedings before the National Labor Relations Board and was argued by counsel.

On consideration whereof, it is now ordered, adjudged and decreed by this Court that the order of the National Labor Relations Board is enforced.

It is further ordered that Petitioner recover from Respondent the costs on appeal as itemized below.

ENTERED BY ORDER OF THE COURT
/s/ John P. Hehman
Clerk

No. 80-1046

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

National Labor Relations Board,
Petitioner,

v.

Borg Warner Corporation; Baker Industries, Inc.; Wells Fargo Armored Service Corporation; Pony Express Courier Corporation,
Respondent.

On Application for Enforcement of an Order of the National Labor Relations Board.

Decided and Filed October 28, 1981.

Before: KEITH and MARTIN, Circuit Judges; and DUNCAN,* District Judge.

PER CURIAM. This case is before the court on application of the National Labor Relations Board for enforcement of the Board's order issued against Borg Warner Corporation and its

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* Honorable Robert M. Duncan, United States District Judge for the Southern District of Ohio, sitting by designation.

subsidiaries Baker Industries, Wells Fargo Service Corporation, and Pony Express Courier Corporation on September 27, 1979 and reported at 245 N.L.R.B. No. 73.

The issues presented are: 1) whether the named corporations constitute a single employer for purposes of the National Labor Relations Act (29 U.S.C. § 151 *et seq.*) and whether Pony Express is the *alter ego* of Wells Fargo; 2) whether respondent violated section 8(a)(5) and (1) of the Act by failing to bargain in good faith with the Union concerning the effects of its decision to transfer courier work from Wells Fargo to Pony Express; 3) whether respondent violated section 8(a)(3) and (1) of the Act by laying off five employees and constructively discharging another as a consequence of the transfer of courier work; and 4) whether respondent must recognize the Union as the bargaining agent for Pony Express.

With regard to the first issue, the Administrative Law Judge considered the following historical and technical interrelationship between Wells Fargo and Pony Express: Pony Express was incorporated in 1975 for the purpose of assuming much of Wells Fargo's courier service. That business involves the transfer of non-intrinsically valuable articles under low security circumstances. Wells Fargo remained a separate entity, offering primarily armored car services. However, both corporations are wholly owned subsidiaries of appellant Baker Industries which in turn is 97 percent owned by appellant Borg Warner. Furthermore, Pony Express and Wells Fargo share a number of top executive officers including the president, vice-president, secretary, and treasurer. Also, the vice-president for personnel, Mr. Hughes, renders labor advice for both corporations. Finally, the two corporations share common offices, post office boxes, and lockboxes. As an example of the close relationship between those two corporations, the Administrative Law Judge reviewed the details of the takeover by Pony Express of the Nashville and Knoxville courier operations. In this in-

stance Wells Fargo vans were simply repainted and "sold" to Pony Express via a paper transaction. On these facts the Administrative Law Judge concluded respondents constituted a single employer and that Pony Express was the *alter ego* of Wells Fargo for purposes of the National Labor Relations Act.

The second issue, the section 8(a)(5)(1) charge, arose out of Wells Fargo's tardy notice to the Union of its intention to transfer the Nashville and Knoxville courier operations. That decision was reached by the company in January of 1978, but Union officials were not notified until March 30, two days prior to the planned April 1 transfer. On March 31, the Union's counsel wrote the company suggesting certain measures which might be taken to minimize the adverse effects of the transfer on the Wells Fargo employees. The company's reply stated its mistaken belief that it had no obligation to bargain with the Union concerning the effects of the transfer decision. *See First National Maintenance Corp.* v. *N.L.R.B.*, 49 U.S.L.W. 4769 (June 22, 1981). Thereafter the transfer was effected and although some additional discussions were had concerning the transfer effects, the Administrative Law Judge found that respondents by failing to give the Union timely notice, had made good faith bargaining impossible.

The consequences of the courier transfer complained of by the Union were the layoff of five employees and the constructive discharge of another. These dismissals occurred because Wells Fargo did not offer these employees jobs as part of the beginning of services at Pony Express. The underlying reason was illuminated by testimony of company officials which stressed the need to hold wages paid to Pony Express employees to levels below those then paid to Wells Fargo's unionized employees. This action, the Administrative Law Judge concluded, constituted illegal discrimination against union employees in violation of section 8(a)(3) and (1) of the Act. This finding was made in the absence of proof of antiunion motivation on the

strengh of the Supreme Court's decision in *N.L.R.B.* v. *Great Dane Trailers, Inc.*, 388 U.S. 26, 34 (1967). There it was held that "if it can reasonably be concluded that the employer's discriminatory conduct was 'inherently destructive' of important employee rights, no proof of antiunion motivation is needed. . . ." Refusing to transfer Wells Fargo courier employees to Pony Express without prior negiotiation was conduct which, in the opinion of the Administrative Law Judge, was inherently destructive of employee rights.

The fourth and final issue concerns the Administrative Law Judge's order requiring respondents to bargain with the Union as the representative of Pony Express' Nashville and Knoxville employees. This order stems from the finding that Pony Express is the *alter ego* of Wells Fargo. An employer's duty to bargain with an incumbent union devolves upon the nominally different entity which continues to operate the same business enterprise. *N.L.R.B.* v. *Triumph Curing Center*, 571 F.2d 462, 474 (9th Cir. 1978). Hence Pony Express is obliged to bargain with the union representing the Wells Fargo employees.

It is the opinion of this court that the Administrative Law Judge correctly decided all four issues. The motion of the Board to enforce is granted.

80-1046

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NLRB,
Petitioner

v.

Borg Warner Corp., et al.
Respondents

ORDER

(Filed Jan. 5, 1982)

BEFORE: KEITH, MARTIN and DUNCAN

A majority of the judges of the court having not favored rehearing en banc, the petition for rehearing has been referred to the hearing panel for disposition.

Upon consideration the court concludes that the petition for rehearing is without merit. Accordingly, it is ORDERED that rehearing be and hereby is denied.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman
Clerk

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

Borg Warner Corporation;
Baker Industries, Inc;
Wells Fargo Armored Service
Corporation; Pony Express
Courier Corporation

and

International Union, United
Plant Guard Workers Of America,
Local 102 And Local 106

Cases 26—CA—7268 and
26—CA—7469

DECISION AND ORDER

On May 7, 1979, Administrative Law Judge Robert Cohn issued the attached Decision in this proceeding. Thereafter, General Counsel and Respondent filed exceptions and supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order.[1]

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[1] We have modified the Administrative Law Judge's notice to conform with his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Borg Warner Corporation; Baker Industries, Inc.; Wells Fargo Armored Service Corporation; Pony Express Courier Corporation, Nashville and Knoxville, Tennessee, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, except that the attached notice is substituted for that of the Administrative Law Judge.

Dated, Washington, D.C. September 27, 1979

Howard Jenkins, Jr., Member

Betty Southard Murphy, Member

John C. Truesdale, Member

NATIONAL LABOR
RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

After a hearing at which all parties had the opportunity to present their evidence, the National Labor Relations Board has found that we violated the law and has ordered us to post this notice.

WE WILL NOT refuse to bargain collectively in good faith with International Union, United Plant Guard Workers of America, Local 102 and Local 106, as the exclusive representative for purposes of collective bargaining for our employees at our Knoxville and Nashville locations, respectively, concerning the effects of the transfer of courier operations from Wells Fargo Armored Service Corporation to Pony Express Courier Corporation at the respective locations.

WE WILL NOT discourage membership in the Union by terminating the employment of any of our employees discriminatorily, and by thereafter failing and refusing to reinstate them, or by discriminating in any other manner in regard to their hire and tenure of employment or any term or condition of employment.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed in the National Labor Relations Act, as amended.

WE WILL continue to recognize and, upon request, bargain collectively with the above-named Union as the exclusive representative of our employees in the appropriate units described below. The units shall now and henceforth be construed to encompass the facilities of Wells Fargo Armored Service Corporation and Pony Express Courier Corporation in Nashville and Knoxville, Tennessee, respectively:

> All regular guard employees, being driver guards, messenger guards, and guards, employed by the Company at its Nashville, Tennessee, operations, excluding all other employees, office employees and supervisors as defined in the Act.

All full-time and regular part-time messenger guards, driver guards and guards employed by the Company at its Knoxville, Tennessee, facilities, excluding all other employees, all office clerical employees, professional employees and supervisors as defined in the Act.

WE WILL, upon request, bargain collectively with the Union as the exclusive representative of our employees in the above-described appropriate units, concerning the effects on the employees of the transfer of operations from Wells Fargo Armored Service Corporation to Pony Express Courier Corporation at the Nashville and Knoxville locations.

WE WILL offer the employees named below, who were terminated as a result of our unlawful action, immediate and full reinstatement to their former or substantially equivalent positions (to the extent we have not already done so), at either of our Nashville, Tennessee, locations, without prejudice to their seniority or other rights and privileges, dismissing, if necessary, any persons hired to replace them and WE WILL make them whole for any loss of pay suffered as a result of their termination, including interest.

Danny Mercer	David Thompson
Rick Billings	Lonnie Bennett
Benny King	Rupert Jenkins

Borg Warner Corporation; Baker Industries, Inc.; Wells Fargo Armored Service Corporation; Pony Express Courier Corporation
(Employer)

Dated _____ By _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Mid-Memphis Tower, 8th Floor, 1407 Union Avenue, P.O. Box 4085, Crosstown Station, Memphis, Tennessee 38104, Telephone 901-521-2687.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

Cases 26-CA-7268
26-CA-7469

Borg Warner Corporation; Baker Industries, Inc.; Wells Fargo Armored Service Corporation; Pony Express Courier Corporation

and

International Union, United Plant Guard Workers Of America, Local 102 And Local 106

William D. Levy, Esq., for the General Counsel.

Robert L. Thompson, Esq. (Elarbee, Clark and Paul), Atlanta, GA, for the Respondent.

Carl J. Schoeninger, Esq. (Gregory, VanLopik & Korney), Detroit, MI, for the Charging Parties.

DECISION

Statement of the Case

ROBERT COHN, Administrative Law Judge: This consolidated proceeding, heard before me in Nashville, Tennessee,

on November 15 and 16, 1978,[1] involves a complaint of the General Counsel against Borg Warner Corporation (herein Borg Warner), Baker Industries, Inc., (herein Baker), Wells Fargo Armored Service Corporation (herein Wells Fargo), and Pony Express Courier Corporation (herein Pony Express), based upon original charges filed June 29, by International Union, United Plant Guard Workers of America, Local 102 and Local 106 (herein the Union) in Case No. 26-CA-7268 and on July 31, in Case No. 26-CA-7469 (formerly 10-CA-13872). The order consolidating cases, consolidated complaint and notice of hearing issued November 2, and the answer of the Respondent[2] was duly filed on November 7.

The principal issues in the case are: (1) Whether the four above-named corporations constitute a single employer within the meaning of the National Labor Relations Act, as amended (herein the Act), and whether Wells Fargo and Pony Express are *alter egos;* (2) Whether Respondent violated Section 8(a)(5) and (1) of the Act by deciding unilaterally, and without notifying or bargaining with the Union, to discontinue the assignment of courier work to employees represented by the Union; (3) Whether Respondent violated Section 8(a)(5) and (1) of the Act by failing and refusing to bargain in good faith with the Union concerning the effects upon employees of its decision to transfer courier work from employees at Wells Fargo to employees at Pony Express, at Respondent's Nashville and Knoxville operations; and (4) Whether the Respondent violated Section 8(a)(3) and (1) of the Act by laying off five employees and constructive-

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[1] All dates hereinafter refer to the calendar year 1978, unless otherwise indicated.

[2] The four above-named corporations will hereinafter be referred to collectively as the Respondent.

ly discharging another, as a consequence of the transfer of courier work described in (3) above.

Subsequent to the hearing, counsel for all parties filed posthearing briefs, which have been duly considered.

Upon the entire record, including arguments of counsel and my observation of the demeanor of the witnesses, I make the following:

Findings and Conclusions[3]

I. The Alleged Unfair Labor Practices

A. Background

For some period of time prior to the events giving rise to the issues in this case, Wells Fargo was engaged in the cities of Knoxville and Nashville, Tennessee, in the providing of armored car and courier services for its customers (which were comprised primarily of banking institutions). The record reflects that although there was some interchange of work among the employees of the Company (who were classified as messenger/driver/guard, driver/guard, guard, and part-time employee) because of absences, illness, etc., the day-to-day assignment of work of the employees was divided into two principal categories: (1) courier and (2) armored car. As described

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[3] There is no issue in this case respecting the jurisdiction of the National Labor Relations Board. The complaint in this case alleges sufficient facts concerning the interstate operations of the Respondent, which are admitted in the answer of the Respondent, upon which I may, and do hereby, find that the four corporations above-named are employers engaged in commerce within the meaning of the Act. It is also alleged and admitted, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

by vice president of personnel for Wells Fargo, Timothy W. Hughes, the armored service involves the operation of a bullet resistant, armored truck which is heavy and carries materials which are, in and of themselves, intrinsically valuable. This would, of course, include currency, coins, and negotiable instruments. The employees are armed and are charged predominantly with the protection and safe delivery of the goods. On the other hand, the courier work involves the delivery of small packages of non-negotiable instruments, such as records of bank transfers, which are not, in and of themselves, intrinsically valuable, and does not require the use of the heavy-duty truck. Rather, the courier service is performed in lighter weight vans. While the essence of the armored car sevice is protection of the valuables, the essence of the courier service is time critical delivery.

On May 5, 1972, the Union (Local 106) was certified by the National Labor Relations Board as the exclusive bargaining representative of the employees of Wells Fargo in Nashville, in the following appropriate unit:

> All regular guard employees, being driver guards, messenger guards, and guards, employed by the Company at its Nashville, Tennessee, operation, excluding all other employees, office clerical employees and supervisors as defined in the Act.

Since the issuance of the aforesaid certification, the Company and the Union have entered into a series of collective-bargaining agreements including a collective-bargaining agreement which, by its terms, was effective from July 1, 1975 to July 1, 1978.[4]

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[4] The last collective-bargaining agreement was entered into effective July 1, 1978 until July 1, 1981.

With respect to the Knoxville operation of Wells Fargo, the National Labor Relations Board issued a certification of representatives in Case No. 10-RC-11054 certifying the Union (Local 102) as the exclusive bargaining representative of the employees in the following appropriate unit:

> All full-time and regular part-time messenger guards, driver guards and guards employed by the Company at its Knoxville, Tennessee, facility, excluding all other employees, all office clerical employees, professional employees and supervisors as defined in the Act.

Following the issuance of the aforesaid certification, the Company and the Union entered into a collective-bargaining agreement, which, by its terms, is effective from October 3, 1977 to October 3, 1980.

The issues in this case arise from the decisions of the Respondent, arrived at in January 1978, to divest Wells Fargo of the courier service above-described, in Knoxville and Nashville, and to relocate and continue that service under the aegis and control of Pony Express at those locations, respectively. Such divestiture and change of operations occurred in Nashville on April 1, and in Knoxville on May 1. It appears that, as respects the Knoxville facility, no employees were laid off or terminated by Wells Fargo in connection with the change of operations, due primarily to the fortuitous voluntary quitting of some employees at that operation a short time prior to May 1. However, there were five employees laid off in Nashville by Wells Fargo on or about March 31, and the legality of such layoffs are at issue in this proceeding.

We come now to an examination of the evidence respecting the relationship of the four above-named corporations comprising the Respondent in the instant case.

B. The Single Employer and Alter Ego Issue

Borg Warner has been, since on or about January 9, the parent corporation, owning approximately 97 percent of the outstanding voting stock of Baker, whose principal place of business is in Parsippany, New Jersey. Both Wells Fargo and Pony Express are wholly owned subsidiaries of Baker. Indeed, the decision to incorporate Pony Express in 1975 was one made by "Baker Industries and the officers of Wells Fargo and the now officers of Pony Express."[1] It is a reasonable inference that a principal purpose of the establishment of Pony Express was to take over the courier operations of Wells Fargo, since this was done at several locations of Wells Fargo in states other than Tennessee, prior to 1978.

The record reflects that, aside from stock ownership, there is other evidence of affiliation and common ownership and direction among the several corporations. Thus, it appears from the annual reports filed by Wells Fargo and Pony Express with the State of Tennessee, that Wells Fargo has its principal office and place of business in Parsippany, New Jersey, and that the president of Wells Fargo is one T. W. Jones, who is also the president of Pony Express. W. L. Cole, L. M. Polisar and J. A. Meer are vice president, secretary, and treasurer, respectively, of Wells Fargo and of Pony Express. The said L. M. Polisar and T. W. Jones are also members of the board of directors of the two corporations, as well as one M. F. Baker.

The evidence further reflects that Wells Fargo and Pony Express maintain a common office at 6165 Barfield Road, N.E., in Atlanta, Georgia, and maintain a common post office box there. Common officers of Wells Fargo and Pony Express, who maintain their offices in Atlanta, are president T. W. Jones and vice president W. L. Cole.

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[1] Testimony of Bennett, an officer of Pony Express.

Timothy W. Hughes is vice president of personnel of Wells Fargo, reporting directly to the presdient of the Company, T. W. Jones. Hughes testified that he assists and renders advice in areas of labor relations and recruitment to the operating officers of Wells Fargo. Hughes acknowledged that while he was not an officer of Pony Express, if a labor relations problem arose involving that company which came to the attention of T. W. Jones, Hughes would perform the same labor relations functions with respect to Pony Express as he does on behalf of Wells Fargo. Indeed, the record reflects that Hughes responded as an official of Pony Express to an inquiry of counsel for the Union on the letterhead of that corporation.[6]

Moreover, I note, as additional evidence on the single employer issue, documentary materials in the record[7] which reflect that, following the transfer of operations from Wells Fargo to Pony Express, hereinafter described, the two companies maintained a common lock-box and post office box in Memphis, Tennessee, to enable customers of either to transmit payments at the common location, and that "acceptable payees" included both companies.[8] Such instructions emanated from an official of Baker in Parsippany, New Jersey.

The record further reflects that, following the transfer of the courier operations, the nature and function of such operations remained the same; that such operations were carried on with substantially the same type of equipment—indeed, Pony Express utilized the same vans as Wells Fargo, repainting the outside of vehicles to reflect the name of the new owner. The parties stipulated that the sale and purchase of the equipment from Wells Fargo to Pony Express was only a paper transaction.

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[6] See G.C. Exh. No. 5

[7] G.C. Exhs. No. 12 and 13.

[8] See. G.C. Exh. No. 13(a).

Finally, the record shows some sales and/or managerial employees of Wells Fargo were employed by Pony Express following the transfer of operations, and that the customers of Pony Express remained substantially the same.

Based upon the foregoing indicia of common ownership, management, and control of the above-named corporations, and noting that common direction and control of labor relations policies of Wells Fargo and Pony Express are vested in the same persons, I am convinced, and therefore find, that the corporations constitute a single employer for purposes of this proceeding,[9] and that Pony Express is the *alter ego* of Wells Fargo.[10]

C. Events Leading to the Change in Operations

The record reflects that for a period of time prior to the events in this case, the Respondent had determined for apparently economic reasons, to separate the armored car and courier functions of the Wells Fargo operations.[11] Pete Bennett presently an assistant vice president of Pony Express, testified that the decision was made by top management in the calendar year 1975 "to break the courier work out and form a separate courier company specializing in time critical delivery of non-negotiable type items." Pursuant to such decision, Pony Express was incorporated in that year, and the Company com-

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[9] See *Radio Union* v. *Broadcast Service of Mobile, Inc.*, 380 U.S. 255 (1965); *Royal Typewriter Co.* v. *N.L.R.B.*, 533 F.2d 1030 (C.A. 8).

[10] See, e.g., *Crawford Door Sales Company, Inc.*, 226 NLRB 1144; *Marquis Printing Corporation*, 213 NLRB 394; *Nelson Electric, et al.*, 241 NLRB No. 88 (3/28/79).

[11] Indeed, it would seem, as previously noted, that Pony Express was incorporated in 1975 to fulfill that purpose.

menced separating the courier function from the armored car function at Wells Fargo locations in several states of the United States beginning in Florida and continuing in Alabama, Louisiana, and others. Rod Proto, vice president and general manager of the Memphis region of Wells Fargo (which included the Nashville and Knoxville operations) testified that he made the decision in January 1978, to get out of the courier business at those locations, and transfer the same to Pony Express. After notifying his superiors in the Company (which included T. W. Jones, president of both Wells Fargo and Pony Express) of such decision, Proto, on January 30, wrote Timothy Hughes, vice president of personnel for Wells Fargo, advising him of the contemplated transfer and requesting Hughes to notify the Union concerning it. However, it was not until almost 2 months later on March 20, that Hughes telephoned the vice president of the International Union in Detroit, a Mr. Applin, concerning the matter.[12] Hughes testified that he told Applin that he wished to meet with him to discuss a matter of some urgency, but did not mention the nature of the subject matter or, indeed, the fact that the Wells Fargo operations in Nashville and Knoxville were involved. Applin told Hughes that he (Applin) was about to go into the hopsital, and referred Hughes to a Mr. Jack Russell, a regional director of the International Union who also seved as assistant to the president of the Union.[13] Hughes thereafter contacted Russell by telephone, apparently the same day, to seek a

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[12] Proto testified that in February, he had talked to Applin concerning the loss of a contract with the Federal Reserve Bank in Nashville, which would result in a layoff of some employees, the extent of which he was unable to ascertain at that time. Proto did not, however, advise Applin of the contemplated transfer of the courier business to Pony Express.

[13] Russell testified that Region 10 covered most of the southern states of the United States and that he had negotiated contracts covering terms and conditions of employment for employees at Wells Fargo at the Nashville and Knoxville facilities.

meeting. A meeting was arranged for March 30, at the International headquarters in Detroit, Michigan.[14]

On March 30, Hughes, along with a Mr. Pete Jenson, an assistant vice president and operating manager of Wells Fargo's Nashville and Knoxville operations, met with Russell in Detroit. At that meeting, Hughes advised Russell for the first time of the Respondent's intention of transferring the courier operation to "a sister corporation of Wells Fargo also owned by Baker Industries called Pony Express."[15] Russell testified that Hughes indicated that there would be some employees laid off in Nashville and Knoxville, to which Russell responded that there was not much the Union could do about it so long as no one else performed the work.

Immediately following the meeting on March 30, Russell turned the matter over to the Union's counsel, who, on March 31, dispatched the following letter to Hughes:

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[14] There is a variance of the testimony between Hughes and Russell respecting the question of why the meeting was scheduled on March 30 rather than sooner. Hughes testified that Russell told him that March 30 was the soonest date he could meet because of involvement in other matters. Russell testified that Hughes never used the word "urgent" in his telephone conversation, and denied that he told Hughes that he would be unable to meet with him sooner than the 30th of March. Rather, according to Russell's testimony, Hughes suggested the March 30 date because Hughes stated it would be convenient for him (Hughes) to stop by Detroit in connection with a trip Hughes had scheduled for New York. Considering the probabilities of the situation, including the Respondent's general lack of alacrity in notification of the Union of this important change in operations, along with demeanor considerations, I credit Russell.

[15] Hughes also advised that both Wells Fargo and Pony Express, which were owned by Baker Industries, had recently been acquired by another corporation named Borg Warner.

Mr. Jack Russell has asked me to write you concerning the partial closing of Wells Fargo courier operations at Nashville and Knoxville. I am advised that five employees will be laid off at Nashville on April 1 and that three employees will be laid off at Knoxville on May 1.

For present purposes the UPGWA will assume that the partial closings are for sound economic reasons and that layoffs will be in accordance with contractual seniority provisions. The Company does, however, have a duty to bargain with the Union regarding the effects of its decision. To that end, I request your consideration of the following proposal.

The Union requests that the Company provide it with a letter or memorandum of understanding containing the following points:

1. That laid off employees will remain eligible for recall to the Company's operations in accordance with the applicable contract provisions. The partial closings have not terminated the senioroity rights of the affected employees.

2. That in the event the Company, its parent Company, or any subsidary (sic) or directly controlled company of either, engages in security or courier work in Nashville and/or Knoxville, employees on layoff from Wells Fargo will be offered employment in order of seniority before any new hires. Any refusal to accept such employment will not affect the employees' recall rights with Wells Fargo.

Hopefully, the foregoing will receive your favorable consideration. Please direct your early reply to Mr. Russell and the undersigned.

Hughes responded by letter dated April 4, as follows:

> This is to acknowledge receipt of your March 31, 1978 letter.
>
> Contrary to the position you take therein, and in view of the very specific Contract language which exists within the documents governing the collective bargaining relationship between the Company and the Union at the above-noted locations, we do not agree that there is an obligation to bargain with the Union in this case.
>
> Should you have any further questions or wish to discuss this matter further, please do not hesitate to contact the writer at the letterhead address appearing above.

Meanwhile, at the Wells Fargo Nashville facility, some of the employees were told for the first time on Friday evening, March 31, that the Company was no longer going to be performing "transit work" i.e., courier work, and that the employees who were then performing such work would be transferred to driving an armored car.[16] The employees were so advised by a Mr. Hodges, the plant manager of the Nashville facility of Wells Fargo, who also told the employees that Pony Express would be taking over the transit operation the following Monday morning. The Pony Express operation was located about 4 or 5 miles from the Wells Fargo location.

Tony Robinson, an employee of Wells Fargo (classified as a driver/messenger/guard), who was also president of Local 106, testified that the only conversation he had with management concerning the transfer was on Friday morning, March 31, with the said Hodges. Hodges advised that Pony Express was taking over the transit work, and that there were going to be some employees laid off. However, Hodges did not advise Robinson

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[16] The employees involved were Marshall Smith, Rupert Jenkins, and a Mr. McRaven.

of the names of such employees at that time. Robinson later learned that the five employees laid off were Lonnie Bennett, Danny Mercer, Rick Billings, Benny King and David Thompson.

It appears that the individuals laid off were, in fact, terminated in accordance with the seniority provisions of the collective-bargaining agreement, and that the older employees such as Marshall Smith, Rupert Jenkins and McRaven, drivers of the courier vans, were informed that they would be required to drive the armored vehicles or be terminated.[17] Employee Rupert Jenkins told Hodges that he did not desire to drive the armored vehicle because it was "pretty dangerous," but when faced with the alternative of termination, Jenkins indicated that he would make an attempt. After driving the armored vehicle for 2 days, Jenkins told Hodges that it was "too dangerous and he did not want to get killed." Hodges responded that he would have to terminate Jenkins, and did so. Smith and McRaven continued to operate the armored vehicles with no change of rate of pay and with the retention of their seniority.

The parties stipulated that the Respondent did not offer any employee at the Wells Fargo facility in Nashville the opportunity to perform courier work with Pony Express on April 1, or thereafter.

As previously noted, the transfer of the courier work from Wells Fargo to Pony Express in Knoxville was accomplished on or about May 1. However, due to some fortuitous quitting by some employees at the Knoxville facility in April, there were no layoffs of employees in Knoxville as a consequence of the transfer of operations.

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[17] Testimony of Rupert Jenkins. Hodges was not called as a witness.

By separate letters dated April 26, addressed to Pony Express in Nashville (but referring to both Nashville and Knoxville operations) union attorney Carl Schoeninger expressed the Union's position that Pony Express was a successor employer to Wells Fargo, that the Company recognize the Union as the representative of its employees in the bargaining units at the two locations, and that Pony Express honor the collective-bargaining agreements between Wells Fargo and the respective locals. By letter dated May 3, the aforesaid Timothy Hughes responded to the April 26 letters, stating, in essence, that Pony Express was not a successor corporation to Wells Fargo and that, further, Pony Express had a "good faith doubt" that the Union represented a majority of its employees at either Nashville or Knoxville.[18]

On May 2, in a telephone conversation between union attorney Schoeninger and Hughes, a meeting between representatives of the Respondent and the Union was scheduled to take place on May 9 in Louisville, Kentucky.[19] Present at the May 9 meeting for the Company were Hughes and Proto. The Union was represented by Donald Bray, a regional director of the Union from region 4, and another union representative named Joe Lucas. The company representatives utilized the meeting to point out to the union representatives their position that it was the loss of several contracts with their customers which occasioned the layoff in Nashville, and, contended that there would have been a layoff of some employees even had there been no transfer of courier operations. It was also pointed out that the layoff was conducted strictly in accordance with contractual

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[18] It is noted that, in his letter to Schoeninger, Hughes utilized the letterhead of Pony Express Courier Corporation, at its aforesaid Atlanta, Georgia address.

[19] Louisville was chosen as a compromise point between Detroit and Atlanta.

provisions, and that several of the affected employees had been offered the opportunity to return to work. Moreover, the company representatives contended that the Respondent had a right to do away with the courier service under the management rights clause of the contract. However, when Bray inquired about the representation of employees at Pony Express, Hughes responded that this was a matter which the Union would have to take up with the National Labor Relations Board. Moreover, when Bray asked Hughes if the Respondent would offer the laid off people positions at other locations, Hughes advised that he did not feel that the Respondent was obligated to do that. Finally, Hughes assured Bray that the laid off employees received all the benefits to which they were entitled under the contract.

D. Analysis and Concluding Findings

1. The alleged refusal to bargain

Although the present state of the law on the point is not a paragon of clarity, it may be assumed for purposes of this discussion that the Respondent had an obligation to notify and bargain with the collective bargaining representative concerning its decision to transfer the courier service from the Wells Fargo operations in Nashville and Knoxville to the Pony Express locations in those cities, respectively.[20] I do not feel compelled to analyze and definitively resolve that the issue since I find, in agreement with the contentions of the Respondent, that even if it be held that the Respondent were compelled to bargain with the Union concerning that decision, the Union effectively waived its rights to require such bargaining through its agreement in the collective-bargaining the so-called "management rights" clause therein. Thus, at both Knoxville and Nashville locations, the collective-bargaining agreements between Wells Fargo and the Union contained the following clause:

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[20] Compare *Ozark Trailers, Inc.*, 161 NLRB 561, with *Royal Typewriter Co.* v. *N.L.R.B.*, 533 F.2d 1030 (8th Cir., 1976). On this point, I recognize, of course, that I am bound to follow the Board's view until it is changed either by the Board or a decision of the U.S. Supreme Court.

RESPONSIBILITIES, DUTIES AND RIGHTS
OF THE COMPANY

It is agreed that except as specifically limited by a particular provision herein this Agreement, the management and operation of the business is vested in and shall remain exclusively the right of the Company. Included within such management rights but not limited thereto are such rights as the right to hire, assign, direct, train and determine the size of the work force; the right to discipline or discharge employees for just cause; the right to determine the nature and methods of operation of the business, including the right to determine routes, the assignment of vehicles, the number of shifts, starting and quitting times, and the schedule of operations. The Company shall also have the right to sell, close, liquidate, or cease operations in whole or in part, or to add to, change, modify existing operations; to employ part-time employees; to make necessary rules and regulations in the operation of the business; and other such actions as may be found necessary, in the sole discretion of the Company, to operate the business in an efficient and satisfactory manner.

In *Consolidated Foods Corporation,*[21] the Board dismissed a complaint in which it was alleged that the Respondent therein violated Section 8(a)(5) and (1) of the Act by unilaterally transferring driving operations from one of its plants to another, for economic reasons, without bargaining concerning such decision with its collective-bargaining representative. The Board dismissed the complaint, finding that one of the articles in the collective-bargaining agreement then in effect, gave the Respondent the exclusive right to "change, modify or cease its operation, processes, or production, in its discretion . . . [and that] . . . the employer should be the sole judge of all factors involved including . . . location of business and personnel."

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[21] 183 NLRB 832.

In the instant case, as above-noted, the management rights clause provides, *inter alia*, that "the Company shall also have the right to sell, close, liquidate, or cease operations in whole or in part, or to add to, change, modify existing operations; . . ." Thus, it would appear that the clause in the instant case is at least as broad as—if not broader than—the clause in the *Consolidated Foods* case. Accordingly, I find that the union effectively waived, through its agreement to such clause in the collective-bargaining contract, its right to require bargaining concerning the decision to transfer the courier work to another location.[22]

However, it does not follow that the Union waived its right to negotiate concerning the effect upon the employees in the bargaining units of the Respondent's exercise of its prerogative to alter the existing structure of the unit, i.e., the location of the employees performing the work and their representation for collective-bargaining purposes.[22a] Under all the circumstances of this case, I conclude and find that the Respondent did not fulfill its obligation in this regard.

Thus, the evidence shows that the decision to transfer the courier operation in the Nashville and Knoxville areas was made in January. Yet, it was almost 2 months later, and only 10 days prior to the planned implementation of the decision in Nashville before the Company attempted to notify the collective-bargaining representative of such decision. Even in that

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[22] This finding subsumes the antecedent finding, which I make, that substantial evidence in the record shows that the decision was made for economic reasons and not pursuant to an anti-union motivation. However, I find that the decision was utilized by the Respondent as a means of ridding itself of the Union at the locations to which the operations were transferred. Cf. *Allied Mills, Inc.*,218 NLRB 281.

[22a] See *Royal Typewriter Co.* v. *N.L.R.B.*, 533 F.2d 1030, 1039 (C.A. 8).

telephone conversation between Hughes and Russell on March 20, the most that Hughes confided to the union representative was that he (Hughes) desired to confer with the Union respecting a matter of some urgency—without mentioning the nature of the matter or the location involved. Even if Russell had agreed to meet the next day, it would have hardly afforded the Union sufficient time to become fully advised of the subject matter, confer with all interested individuals involved, to formulate plans and proposals for options or alternatives to deal with the problem, present the Company with such proposals, and attempt to negotiate respecting all these matters prior to the date of the effectuation of the plan. Moreover, and more importantly, even after the company representatives met with the Union and advised them of the decision to transfer, the Company was never willing either in its discussions or in correspondence to negotiate with the Union respecting the critical point of opportunity of the affected employees to transfer to the new locations, as well as with respect to their working conditions should they opt to accept such offer. In this regard, the Respondent clearly failed to live up to its obligations under the Act.

Thus, in *Cooper Thermometer Co.* v. *N.L.R.B.*, 376 F.2d 684, the Court of Appeals for the 2nd Circuit stated:

> . . . the Board may reasonably interpret §8(a)(5), as explicated in §8(d), as requiring an employer relocating his plant not merely to give reasonable notice to a recognized union and to negotiate the terms of the shutdown, as we held in *N.L.R.B.* v. *Rapid Bindery, Inc.*, 293 F.2d 170, 48 LRRM 2658 (1961), but also to discuss with it the basis on which employees may transfer and, in that connection, to give information as to jobs in the new plant essential to the intelligent formulation of the union's requests. The most important interest of workers is in working; the Board may reasonably consider that an employer does not fulfill his

> obligations under §8(a)(5) if he refuses even to discuss with employees' representatives on what basis they may continue to be employed.

In *Westinghouse Electric Corporation,*[23] the Board commented upon its holding in the *Cooper* case as follows:

> The *Cooper Thermometer* type of case is concerned with a loss of jobs caused by the partial or complete termination of an operation at one location and its relocation at another. In such situations, the employees at the old plant are directly affected by the relocation, and an employer is required to negotiate not only respecting the shutdown, but also the bases and conditions on which employees affected by the termination may transfer to the new location and thus continue to be employed.[24]

In view of all of the foregoing, I conclude and find that the Respondent violated Section 8(a)(5) and (1) of the Act by failing to bargain with the Union concerning the effects upon the employees of its decision to transfer the courier work to a sister corporation at other locations.

2. The alleged discrimination

The complaint alleges that the Respondent laid off five of its employees in Nashville as a consequence of the transfer of the courier operations from Wells Fargo to Pony Express, and that such conduct constituted illegal discrimination in violation of Section 8(a)(3) and (1) of the Act. The Respondent contends

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[23] 174 NLRB 636.

[24] See also *Allied Mills, Inc.*, 218 NLRB 281. Respondent argues that these cases are not pertinent because Wells Fargo and Pony Express are separate companies. However, I have, of course, held that they are *alter egos,* for reasons discussed *supra.*

that these employees would have been laid off in any event as a result of the loss of business which occurred at about this time in Nashville, and in any event, there is no proof that the Respondent harbored any anti-union animus which is a necessary element of proof in a Section 8(a)(3) violation. For the reasons set forth below, I disagree with the Respondent's contentions.

Thus, although I agree with Respondent that there is a lack of evidence in this case that the Respondent planned and implemented the transfer of operations in retaliation for any union activities of its employees, the evidence certainly discloses that the Respondent utilized the transfer as a vehicle to escape the obligations of the collective-bargaining contract respecting employees who performed the courier service. Although such employees were not laid off because of seniority considerations, they "bumped" employees who drove the armored cars, and those employees were laid off. Of course, as the Respondent contends it may be that some of the armored car employees would have been laid off in any event as a result of the loss of business occasioned by Wells Fargo at this time. Nevertheless, it certainly cannot be said with assurance that all of them would have been laid off particularly since the evidence shows that Pony Express hired, initially, (in Nashville) five new part-time employees at the commencement of operations and, at the time of the hearing, employed six employees. Thus, it would appear that Respondent might have avoided the layoff of any employees had it simply offered the courier employees of Wells Fargo the opportunity of working at Pony Express.

The reason it did not do so, however, seems clear. The Respondent's testimony was that the transfer was made in order to become competitive with the Respondent's competition in the area, and the evidence shows that Pony Express hired the new employees at an initial rate of $3 per hour whereas the employees at Wells Fargo performing similar work were obtaining at least $3.70 per hour plus other fringe benefits provided in the collective-bargaining agreement.

Under all of the circumstances, it cannot be said with assurance that employees would have been laid off in any event because of economic considerations had not the transfer occurred. Moreover, since it was the Respondent's conduct which made it impossible to disintangle the consequences of the two events, it must be the one to bear the burden of the consequences.

Finally, as respects the Respondent's arguments concerning lack of evidence of anti-union motivation, the answer is provided by the decision of the United States Supreme Court in *N.L.R.B.* v. *Great Dane Trailers, Inc.*[25] The Court held in that case that "if it can reasonably be concluded that the employer's discriminatory conduct was 'inherently destructive' of *important* employee rights, no proof of an antiunion motivation is needed and the Board can find an unfair labor practice even if an employer introduces evidence that the conduct was motivated by business considerations."[26] (Emphasis supplied.) The Court of Appeals in *Cooper Thermometer, supra,* pointed out that "the most important interest of workers is in working."[27] Clearly, the actions of Respondent here in cutting off that important interest, i.e., by not allowing the Wells Fargo employees performing courier service to transfer to Pony Express, constituted conduct which was "inherently destructive" of important employee rights. Thus, it was violative of Section 8(a)(3) and (1) of the Act.[28]

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[25] 388 U.S. 26 (1967).

[26] *Id.* at page 34.

[27] 376 F.2d 684, 688.

[28] *Allied Mills, Inc., supra.*

3. Alleged discrimination against Rupert Jenkins

The complaint alleges that on or about April 4, Wells Fargo constructively discharged its employee Rupert Jenkins, at its Nashville, Tennessee, operation, in violation of the Act.

This employee had worked for Wells Fargo since 1969. His regular job was driving a courier van, performing "transit work," although on occasions, he was assigned to work in an armored car when a regular employee was absent. Jenkins testified that he had worked in an armored car approximately 10 to 12 times during his entire employment at the Company. The record shows that on the last day of March it was announced to the employees orally and by notice on the bulletin board that some of the employees would be laid off and some of the courier drivers would be transferred to armored car work based upon their seniority. When Jenkins advised assistant vice president of the Company, Peter Jenson, that he did not know whether he wanted to drive an armored car or not since it was "pretty dangerous," Jenson replied that Jenkins would "either drive it, you can drive it or I will have to terminate you." Jenkins responded he would try. Jenkins drove the armored car for 2 days before advising plant manager Hodges he would no longer be able to perform that work because it was "too dangerous and he did not want to get killed." Hodges responded that he would have to terminate Jenkins, and did so.

The facts in the instant case do not add up to, in my judgment, a constructive discharge in the traditional sense. That is to say, there is no evidence that the Respondent assigned Jenkins to the armored truck job with the expectation—or—hope that he would voluntarily quit, in order to discourage membership in the Union. However, the facts do show, as set forth above, that the Respondent transferred the courier operation from Wells Fargo to Pony Express, whose location in Nashville was only a few miles apart, without giving the employees at Wells Fargo who had regularly performed the courier operation, an oppor-

tunity to work at Pony Express. In my view, it was a proximate and foreseeable result of the Respondent's conduct that the employees who had regularly performed courier work at Wells Fargo would be unhappy and disgruntled at the abrupt change in their working conditions. Moreover, it would be a reasonable inference, in my view, had the Respondent offered Jenkins the opportunity to perform transit work at the Pony Express location, he would have accepted the same. Clearly, as previously noted, one of the principal reasons that the Respondent planned and executed the transfers in the manner described was to operate the courier function with employees unfettered by the terms and conditions of employment set forth in the collective-bargaining agreements between the Respondent and the Union. It may be reasonably inferred that this was the prime consideration in not affording the Wells Fargo employees the opportunity to work at Pony Express.

Under all circumstances, I find the quitting of Jenkins to be a proximate result of the Respondent's wrongful and unlawful conduct, and that an appropriate remedy would be to require the Respondent to offer Jenkins the opportunity to become employed at Pony Express, and to make him whole for any loss of earnings he may have suffered as a result of the Respondent's unlawful conduct.[29]

II. The Effect of the Unfair Labor Practices Upon Commerce

The activities of Respondent set forth in section I, above, occurring in conection with the interstate operations of Respondent, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several states, and tend to lead to labor disputes, burdening and obstructing commerce and the free flow thereof.

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[29] Cf. *Crawford Door Sales Company, Inc.*, 226 NLRB 1144 (1976).

III. The Remedy

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Having found that Respondent violated Section 8(a)(5) of the Act in particular respects set forth above, I shall recommend that Respondent, upon request, bargain collectively with the Union concerning the effects upon the represented employees of the relocation of its courier operations from Wells Fargo to Pony Express in Knoxville and Nashville, Tennessee. Since the collective-bargaining agreements between the Respondent and the Union were in effect at the time the unfair labor practices occurred, it will be ordered that the Respondent continue to recognize and bargain collectively with the Union as the exclusive representative of the employees in the appropriate units.[10] The appropriate units shall henceforth be construed as encompassing the appropriate classifications of employees at the Pony Express facilities in Nashville and Knoxville, it appearing that the only alterations in the language of the unit descriptions are to add an "s" to the word "operation" in the unit at Nashville and the same letter to the word "facility" in the Knoxville unit.

Having found that Respondent discriminated in regard to the hire or tenure of employment of some of its Nashville employees, in the manner set forth above, it will be recommended that Respondent reinstate such employees to their former or substantially equivalent positions at either the Wells Fargo or Pony Express locatons (to the extent Respondent has not

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[10] See, e.g. *Fraser & Johnston Company*, 189 NLRB 142; *Allied Mills, Inc.*, 218 NLRB 281.

already done so),[31] and make each whole for any loss of earnings he may have suffered by reason of the discrimination against him. All such losses are to be reimbursed in the manner set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest thereon to be computed as prescribed in *Florida Steel Corporation*, 231 NLRB 651 (1977).[32]

Respondent's unfair labor practices indicate a purpose of avoiding and avading its collective-bargaining obligations, in derogation of a primary policy of the Act. Accordingly, it will be recommended that Respondent be ordered to cease and desist from in any other manner infringing upon the rights guaranteed employees by Section 7 of the Act.[33]

Upon the foregoing findings of fact, and upon the entire record in this case, I make the following:

Conclusions of Law

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

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[31] There is some evidence in the record that Respondent had reemployed some of the laid off employees at the time of the hearing. However, the time, nature, and extent of such employment is not disclosed, and should be, of course, determined in the compliance stage of this proceeding.

[32] See generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

[33] Cf. *Big Bear Supermarkets No. 3*, 239 NLRB No. 26 (November 1, 1978).

3. The following constitute appropriate units for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All regular guard employees, being driver guards, messenger guards, and guards, employed by the Company at its Nashville, Tennessee, operations, excluding all other employees, office clerical employees and supervisors as defined in the Act.
>
> All full-time and regular part-time messenger guards, driver guards and guards employed by the Company at its Knoxville, Tennessee, facilities, excluding all other employees, all office clerical employees, professional employees and supervisors as defined in the Act.

4. At all times material, the Union has been the majority representative for purposes of collective bargaining with the Respondent, in the aforesaid units.

5. By refusing, since on or about March 31, 1978, to bargain collectively in good faith with the Union as the exclusive representative of the employees in the appropriate units, respecting the effects upon the employees in the appropriate units of the Respondent's transfer of its courier operations from Wells Fargo to Pony Express, Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

6. By discriminating in regard to the hire or tenure of employment of the employees named below, to discourage membership in the Union, the Respondent has engaged in, and is engaging in, unfair labor practices in violation of Section 8(a)(3) and (1) of the Act:

Danny Mercer	Benny King	Lonnie Bennett
Rick Billings	David Thompson	Rupert Jenkins

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:[34]

ORDER

Respondent, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain in good faith with the Union concerning the effects upon employees in the above-described appropriate units, of the transfer of the courier operations from Wells Fargo to Pony Express at the Nashville and Knoxville locations.

(b) Discouraging membership in the Union by termininating the employment of any of its employees discriminatorily, and by thereafter failing and refusing to reinstate them, or by discriminating in any other manner in regard to their hire and tenure of employment or any term or condition of employment.

(c) In any other manner, interfering with, restraining, or coercing employees in the exercise of rights guaranteed in Section 7 of the Act.

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[34] In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Upon request, bargain collectively with the Union as the exclusive representative of its employees in the above-described appropriate units, concerning the effects on the employees of the transfer of operations from Wells Fargo to Pony Express at the Nashville and Knoxville locations.

(b) Offer the employees named below immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges, dismissing, if necessary, any persons hired to replace them, and make them whole for any loss of pay, in the manner set forth in "The Remedy" section of this Decision:

Danny Mercer	Benny King	Lonnie Bennett
Rick Billings	David Thompson	Rupert Jenkins

(c) Continue to recognize and, upon request, bargain collectively with the Union as the exclusive bargaining representative of the employees in the above-described appropriate units. Such units shall now and henceforth be construed to encompass the classifications of employees at both the Wells Fargo and Pony Express facilities of the Respondent, at the respective Nashville and Knoxville locations.

(d) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary and relevant to analyze the amounts of backpay due and the rights of employment under the terms of this Order.

(e) Post at its Wells Fargo and Pony Express facilities, in Nashville and Knoxville, Tennessee, copies of the attached

notice marked "Appendix."[1] Copies of said notice on forms provided by the Regional Director for Region 26, after being duly signed by Respondent, shall be posted immediately on receipt thereof, in conspicuous places, and be maintained for a period for 60 consecutive days. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(f) Notify the said Regional Director, in writing, within 20 days from the date of this Decision, what steps the Respondent has taken to comply herewith.

Dated, Washington, D.C. May 7, 1979

Robert Cohn
Administrative Law Judge

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[1] In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX

NOTICE TO EMPLOYEES

Posted By Order Of The
National Labor Relations Board

An Agency Of The United States Government

AFTER A TRIAL IN WHICH ALL PARTIES HAD THE OPPORTUNITY TO PRESENT THEIR EVIDENCE, THE NATIONAL LABOR RELATIONS BOARD HAS FOUND THAT WE VIOLATED THE LAW AND HAS ORDERED US TO POST THIS NOTICE TELLING OUR EMPLOYEES WHAT WE HAVE BEEN ORDERED TO DO AND NOT TO DO IN THE FUTURE:

WE WILL NOT refuse to bargain collectively in good faith with INTERNATIONAL UNION, UNITED PLANT GUARD WORKERS OF AMERICA, LOCAL 102 AND LOCAL 106, as the exclusive representative for purposes of collective bargaining for our employees at our Knoxville and Nashville locations, respectively, concerning the effects of the transfer of courier operations from WELLS FARGO ARMORED SERVICE CORPORATION to PONY EXPRESS COURIER CORPORATION at the respective locations.

WE WILL NOT discourage membership in the Union by terminating the employment of any of our employees discriminatorily, and by thereafter failing and refusing to reinstate them, or by discriminating in any other manner in regard to their hire and tenure of employment or any term or condition of employment.

WE WILL NOT in any other manner interfere with, restrain or coerce our employees in the exercise of the rights guaranteed in the National Labor Relations Act, as amended.

WE WILL continue to recognize and, upon request, bargain collectively with the above-named unions as the exclusive representative of our employees in the appropriate units described below:

> All regular guard employees, being driver guards, messenger guards, and guards, employed by the Company at its Nashville, Tennessee, operations, excluding all other employees, office clerical employees and supervisors as defined in the Act.
>
> All full-time and regular part-time messenger guards, driver guards and guards employed by the Company at its Knoxville, Tennessee, facilities, excluding all other employees, all office clerical employees, professional employees and supervisors as defined in the Act.

The above-described appropriate units shall now and henceforth be construed to encompass the facilities of WELLS FARGO AMORED SERVICE CORPORATION and PONY EXPRESS COURIER CORPORATION in Nashville and Knoxville, Tennessee, respectively.

WE WILL offer the employees named below who were terminated as a result of our unlawful action, immediate and full reinstatement to their former or substantially equivalent positions (to the extent we have not already done so), at either of our Nashville, Tennessee, locations, without prejudice to their seniority or other rights and privileges, dismissing, if necessary, any persons hired to replace them, and WE WILL make them whole for any loss of pay suffered as a result of their termination, including interest.

Danny Mercer	David Thompson
Rick Billings	Lonnie Bennett
Benny King	Rupert Jenkins

BORG WARNER CORPORATION;
BAKER INDUSTRIES, INC.;
WELLS FARGO AMORED SERVICE
CORPORATION; PONY EXPRESS
COURIER CORPORATION
(Employer)

Dated _____ By _____
(Representative) (Title)

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to Board's Office, Mid-Memphis Tower - 8th Floor, 1407 Union Avenue, P.O. Box 40085 Crosstown Station, Memphis, TN 38104, Telephone (901) 521-2687.

APPENDIX B

Sec. 8.(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain or coerce employees in the exercise of the rights guaranteed in section 7;

* * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 9(e) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: Provided further, That no employer shall justify any discrimination against an employee for non-membership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership.

* * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

• • •

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: Provided, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lockout, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

The duties imposed upon employers, employees, and labor organizations by paragraphs (2), (3), and (4), shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of Section 9(a), and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within any notice* period specified in this subsection or who engages in any strike within the appropriate period specified in subsection (g) of this section* shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 8, 9, and 10 of this Act, as amended, but such loss of status for such employee shall terminate if and when he is reemployed by such employer. Whenever the collective bargaining involves employees of a health care institution, the provisions of this section 8(d) shall be modified as follows:

(A) The notice of section 8(d)(1) shall be ninety days; the notice of section 8(d)(3) shall be sixty days; and the contract period of section 8(d)(4) shall be ninety days;

(B) Where the bargaining is for an initial agreement following certification or recognition, at least thirty days' notice of the existence of a dispute shall be given by the labor organization to the agencies set forth in section 8(d)(3).

(C) After notice is given to the Federal Mediation and Conciliation Service under either clause (A) or (B) of this sentence, the Service shall promptly communicate with the parties and use its best efforts, by mediation and conciliation, to bring them to agreement. The parties shall participate fully and promptly in such meetings as may be undertaken by the Service for the purpose of aiding in a settlement of the dispute.*

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* Pursuant to Public Law 93-360, 93d Cong., S. 3203, 88 Stat. 396, the last sentence of Sec. 8(d) is amended by striking the words "the sixty day" and inserting the words "any notice" and by inserting before the words "shall lose" the phrase", or who engages in any strike within the appropriate period specified in subsection (g) of this section." In addition, the end of paragraph Sec. 8(d) is amended by adding a new sentence "Whenever the collective bargaining . . . aiding in a settlement of the dispute."

Opposition

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No. 81-1557

In the Supreme Court of the United States

OCTOBER TERM, 1982

BORG WARNER CORPORATION, ET AL., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether substantial evidence supports the Board's finding that several employees were laid off because of a transfer of operations, and not because of any loss of business.

2. Whether the Board properly ordered an employer to continue to recognize and bargain with a union as the employees' representative notwithstanding a transfer of part of the employer's operations to another nearby facility.

3. Whether an employer unlawfully discriminated against its employees because of their union status in refusing to consider them for employment at a new facility.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A2-A5) is reported at 663 F.2d 666. The decision and order of the National Labor Relations Board (Pet. App. A7-A43) are reported at 245 N.L.R.B. 513.

JURISDICTION

The judgment of the court of appeals was entered on October 28, 1981 (Pet. App. A1). A timely petition for rehearing was denied on January 5, 1982 (Pet. App. A6). The petition for a writ of cer-

tiorari was filed on February 19, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Borg Warner Corporation owns approximately 97% of the voting stock of Baker Industries, Inc.; Wells Fargo Armored Service Corporation and Pony Express Courier Corporation are wholly owned subsidiaries of Baker (Pet. App. A17).[1] In 1975, Baker and Wells Fargo created Pony Express for the principal purpose of taking over "courier" operations previously performed by Wells Fargo at several locations (Pet. App. A19-A20).[2] Wells Fargo and Pony Express share common management as well as the same office and post office box (Pet. App. A17-A18). Labor relations matters for both Wells Fargo and Pony Express are handled by the same management (Pet. App. A18).

Before 1978, Wells Fargo provided armored car and courier service to its customers in Nashville and Knoxville, Tennessee. Bargaining units at each location were represented by the Union,[3] and there was a collective bargaining agreement in effect at each location during the period relevant to this case (Pet.

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[1] These companies are hereinafter referred to by their individual names or, collectively, as "the Company."

[2] Before Pony Express took over courier operations, Wells Fargo provided both armored car and courier service; armored car service involves the protection and delivery of intrinsically valuable materials such as currency and coins, and courier service involves the time-critical delivery of non-intrinsically valuable documents (Pet. App. A14-A15).

[3] International Union, United Plant Guard Workers of America, Local 106 (Nashville) and Local 102 (Knoxville).

App. A14-A16). Although there were temporary transfers of employees between armored car work and courier work when necessary because of employee absences, armored car and courier services were generally performed by two separate groups of employees (Pet. App. A14).

In January 1978, Wells Fargo decided to transfer its Nashville and Knoxville courier operations to Pony Express. On March 30, Wells Fargo officials met with the Union's Regional Director, advising him of the planned transfer (Pet. App. A20-A21). The Wells Fargo officials indicated that employees in both Nashville and Knoxville would be laid off (Pet. App. A21). On the following day, the Union's attorney wrote the Company asserting that the Company had an obligation to bargain concerning the effects of its transfer decision. The Union attorney also requested the Company to agree that any employees laid off because of the transfer would be hired for courier work performed by the Company or any concern controlled by it in preference to new hires (Pet. App. A21-A22). The Company replied that it had no obligation to bargain (Pet. App. A22-A23).

On March 31, Wells Fargo informed its Nashville employees that Pony Express would be taking over its courier operation in three days and that some employees were to be laid off. Employees who had been performing courier work were given the choice of driving armored cars or losing their jobs. Five employees were laid off because they were "bumped" by courier employees with more seniority. None of Wells Fargo's Nashville employees was offered the opportunity to perform courier work with

Pony Express at any time after the transfer of operations (Pet. App. A23-A24).[4]

Following the transfer of operations in Nashville, the courier service remained the same. The Wells Fargo courier vans were repainted with the name of the new owner; the purchase and sale of equipment between Wells Fargo and Pony Express were paper transactions consisting of accounting transfers; some Wells Fargo sales and managerial employees were employed by Pony Express; and the customers of Pony Express were substantially the same as Wells Fargo's had been (Pet. App. A16, A18-A19).

The Company refused to recognize the Union and honor the collective bargaining agreements at Pony Express; the Company also refused to offer Wells Fargo courier employees positions at the new location, as the Union had requested (Pet. App. A23, A26).

2. Adopting the decision of the Administrative Law Judge, the Board found that the Company had violated Section 8(a)(5) and (1) of the Act by refusing to bargain in good faith with the Union concerning the effects of the transfer of its courier operations from Wells Fargo to Pony Express (Pet. App. A30).[5] In addition, the Board found that the

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[4] On or about May 1, the transfer of courier work from Wells Fargo to Pony Express at the Knoxville location was implemented. Because several Knoxville employees quit in April, no Knoxville employees were laid off as a result of the transfer of operations (Pet. App. A24).

[5] Based upon his findings of "common ownership, management, and control" and the fact that "common direction and control of labor relations policies of Wells Fargo and Pony Express are vested in the same persons," the Administrative Law Judge had concluded that Borg Warner, Baker Indus-

Company had refused to offer the Wells Fargo courier employees work at Pony Express to avoid collective bargaining obligations at the new facility. Therefore, since the record indicated that offering Wells Fargo courier employees work at Pony Express might have avoided the need to lay off or terminate any employees, the Board concluded that the Company had violated Section 8(a)(3) and (1) by laying off employees at Nashville (Pet. App. A30-A31).[6] The Board rejected the Company's assertion that the transfer of operations had not caused any loss of jobs at Wells Fargo (Pet. App. A31).

The Board ordered the Company to bargain with the Union regarding the effects of the transfer of courier operations from Wells Fargo to Pony Express at its Nashville and Knoxville locations and to continue to bargain with the Union in established units.[7] The Board also directed the Company to offer reinstatement at either Wells Fargo or Pony Express to the six employees who had been laid off or terminated and to make them whole for any loss of pay resulting from the Company's unlawful conduct (Pet. App. A39).

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tries, Wells Fargo, and Pony Express constituted a single employer and that Pony Express was the *alter ego* of Wells Fargo (Pet. App. A19).

[6] The Board concluded that the Company's unlawful conduct had also resulted in the termination of another Wells Fargo employee (Pet. App. A33-A34).

[7] In ordering the Company to bargain with the Union on behalf of Pony Express employees, the Board found that the existing units remained appropriate, the addition of the Pony Express facilities in Knoxville and Nashville having altered the unit only by adding new locations for the same work (Pet. App. A35).

3. The court of appeals enforced the Board's order, stating (Pet. App. A4):

> The consequences of the courier transfer complained of by the Union were the layoff of five employees and the constructive discharge of another. These dismissals occurred because Wells Fargo did not offer these employees jobs as part of the beginning of services at Pony Express. The underlying reason was illuminated by testimony of company officials which stressed the need to hold wages paid to Pony Express employees to levels below those then paid to Wells Fargo's unionized employees.

The court further noted that the bargaining order "stems from the finding that Pony Express is the *alter ego* of Wells Fargo" (Pet. App. A5). It explained that "[a]n employer's duty to bargain with an incumbent union devolves upon the nominally different entity which continues to operate the same business enterprise" (*ibid.*).

ARGUMENT

1. Bargaining as to the "effects" of a partial closing is mandated by Section 8(a)(5) of the Act, even if bargaining over the decision to close is not required. See, *e.g.*, *First National Maintenance Corp.* v. *NLRB*, 452 U.S. 666, 681 (1981). Petitioners contend (Pet. 8-10), however, that bargaining was not required in this case because the transfer of courier work had no significant impact on the bargaining unit employees. According to petitioner, the layoffs in this case were caused by a loss of business. The Board, upheld by the court of appeals, rejected this assertion, concluding that the layoffs and the discharge were caused by the transfer of courier work from Wells Fargo to Pony Express and the refusal

to offer Wells Fargo employees the opportunity to work at Pony Express. This evidentiary issue raises no question warranting review by this Court. *E.g.*, *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 491 (1951).

2. Petitioners vaguely assert (Pet. 10-13) that the Board improperly extended Wells Fargo's obligation to bargain with the Union to its alter ego, Pony Express. Petitioners do not contest the Board's finding that Wells Fargo and Pony Express constituted a single employer; nor do petitioners appear to dispute that the Board could properly require Pony Express to recognize and bargain with the Union if the Board found that the employees of Wells Fargo and Pony Express constitute an appropriate unit for bargaining. See Pet. 11-12. Rather, petitioners appear to contend that the Board failed to determine that the Wells Fargo and Pony Express employees constitute an appropriate unit for bargaining and, in any event, that the record could not support such a finding. That contention is without merit.

Before the transfer of courier operations to Pony Express, the Union was the certified bargaining representative for the following unit of Wells Fargo employees in Nashville (Pet. App. A15):

> All regular guard employees, being driver guards, messenger guards, and guards, employed by the Company at its Nashville, Tennessee, operation, excluding all other employees, office clerical employees and supervisors as defined in the Act.

This unit included both armored car employees and courier employees. See Pet. 9-10. The decision to "transfer" the courier operation to Pony Express, which "was located about 4 or 5 miles from the Wells Fargo location" (Pet. App. A23), obviously did not

affect the appropriateness of the unit. The Board specifically found (Pet. App. A37) that the unit comprising Wells Fargo armored car employees and Pony Express courier employees was appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act (29 U.S.C. 159(b)). See also Pet. App. A35. Further, the Board found that "[a]t all times material, the Union has been the majority representative for purposes of collective bargaining * * * in the aforesaid unit[]" (Pet. App. A37).[8]

3. Finally, petitioners urge (Pet. 14) that the layoffs of the Wells Fargo employees did not violate Section 8(a)(3) of the Act since the layoffs were "economically motivated" and effected without "anti-union motivation." That assertion simply ignores the Board's findings. While the Board found that the decision to transfer the courier work from Wells Fargo to Pony Express was economically motivated, the layoffs resulted from the Company's refusal to transfer Wells Fargo courier employees to Pony Express. That decision was motivated by the Company's desire to avoid collective bargaining agreement wage and benefit obligations at Pony Express. Refusal to consider employees for job opportunities because of union considerations violates Section 8(a)(3) of the Act. See, *e.g.*, *Allied Mills, Inc.*,

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[8] Thus, petitioners' reliance (Pet. App. 10-12) on *South Prairie Construction Co.* v. *Local 627, IUOE*, 425 U.S. 800 (1976) (per curiam), is wholly misplaced. There the Court held that the court of appeals had erred in determining in the first instance that the employees of two companies constituted an appropriate bargaining unit. Rather, after holding that the two companies constituted a single employer, the court of appeals should have remanded the case to the Board for determination of whether the employees of the two companies constituted an appropriate unit.

218 N.L.R.B. 281, 288-289 (1975), enf'd, 543 F.2d 417 (D.C. Cir. 1976) (Table), cert. denied, 431 U.S. 937 (1977); *Coated Products, Inc.*, 237 N.L.R.B. 159, 166-167 (1978), enf'd, 106 LRRM 2364 (3d Cir. 1980) (Table). As the Board and the court of appeals recognized, discriminating against employees because of their union status is "inherently destructive of employee interests," within the meaning of *NLRB* v. *Great Dane Trailers, Inc.*, 388 U.S. 26, 33 (1967). Nothing is more destructive of employee rights to freely choose unionization than to be denied employment opportunities because of that choice.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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